What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause

R. George Wright*

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* Lawrence A. Jegen Professor of Law, Indiana University School of Law—Indianapolis. The author's thanks are hereby extended to Jennifer Ekblaw and Rachel Anne Scherer.

I. INTRODUCTION

The most fundamental question in free speech law is not whether to protect the speech in question, either as a matter of absolute principle[1] or through some judicial test.[2] More fundamental is whether "speech," for purposes of the First Amendment, is even present. Not everything imaginable counts as speech in the relevant constitutional sense. If freedom of speech has particular purposes and goals, the idea of speech must have some bounds and limits. Speech for First Amendment purposes cannot include everything. One can be a free speech absolutist, certainly, only if not everything counts as speech.[3]

So, we must distinguish two problems in every free speech case. The first and most fundamental problem, and the focus of our attention here, is always one of the scope,[4] range, or boundaries of what counts as speech for First Amendment purposes. Only if we decide that the case presents speech in the relevant sense, must we then face the second and more familiar problem. The second problem is the proper degree or stringency of the constitutional protection to be accorded,[5] or of the structure of that constitutional protection.[6]

If we decide that speech is involved in the first place, we can then choose the degree of stringency and structure of the First Amendment protection we consider appropriate. Often this latter choice will involve the

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1. *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

2. Among the expanding variety of increasingly sophisticated judicial free speech tests, *see, e.g.*, Morse v. Frederick 551 U.S. 393 (2007) (certain forms of public school student speech); Garcetti v. Ceballos, 547 U.S. 410 (2006) (public employee speech); Miller v. California, 413 U.S. 15 (1973) (certain forms of pornography); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel of public officials).

3. As recognized in Black, *supra* note 1, and illustrated in *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (Cohen's anti-draft jacket writing as an "absurd and immature antic" amounting, crucially, to "mainly conduct and little speech"). More moderately, even if we like the idea of deciding close free speech cases in favor of the speaker, in order to better insulate "core" speech, it does not follow that we should include as much as possible, however trivial, in the category of "speech" for free speech purposes.

4. The basic terminology for this distinction was popularized in FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89 (1982).

5. *See id.*

6. Consider, for example, the refinement in the structuring of free speech protection in the libel context. *See, e.g.*, *Sullivan*, 376 U.S. 254; Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (public figure plaintiffs); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (limits on actual malice requirement for private figure plaintiffs); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (plurality opinion) (refining *Gertz* in case of speech not on matters of public interest and concern); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (burden of proof on issue of falsity).

balancing of the free speech interests with the other, perhaps conflicting, interests at stake.[7]

But the difficult and complex prior question is that of the scope of what should count as speech at all, for First Amendment purposes. As we shall see,[8] we cannot evade this question without paying a substantial price. To merely assume for the sake of argument that the purported speech in question counts as speech, and then leave that merely assumed speech in the end constitutionally unprotected, often involves unnecessary costs. There will turn out to be practical value in making progress on what should count as speech in the first place.

As to our crucial question of how best to define the scope of speech, and to decide what counts as speech in particular cases, we shall eventually conclude that no simple approach will suffice. A multi-factored, multi-layered, interrelated approach, however untidy, is inescapably necessary. As our concluding section will concisely highlight, in deciding on what counts as speech, we must take interactive account of the constitutional text; originalism in constitutional meaning; functionalism in interpretation; the theory of symbolism and pre-symbolism; the roles of basic free speech values, general rules, mid-level "heuristics," and specific contexts and circumstances; theories of meaning, ambiguity, and vagueness; as well as Supreme Court precedents, on their own and as applied.[9] No tidy solution is possible. No simple formula will do.

Making such progress in understanding speech in terms of the vital area of free speech law is plainly important. However, another intriguing application of how we come to our understanding exists beyond that which we can explore here; any progress we make in clarifying what should count as speech for First Amendment purposes may have a carry-over value into other areas of the law as well. A number of other important problems in the law may be approachable with analogous techniques reaching similar results.

For example, within the scope of the Bill of Rights, one immediately notes a number of potentially crucial terms that, like speech, are not defined within the Constitution. Can we have, for example, a satisfactory theory of the freedom of the press without a theory of what the "press" amounts to?[10]

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7. See the public employee speech case of *Rankin v. McPherson*, 483 U.S. 378 (1987), for merely one example of an explicit weighing of various conflicting interests in a free speech context.

8. *See infra* Parts V, XII, & XIII.

9. See *infra* Part XIII for a concise accounting of these considerations.

10. *See* U.S. CONST. amend. I. We could, in principle, simply decide every free press case as a free speech case. Courts have sometimes gestured in such a direction. *See, e.g.*, David A. Anderson,

In addition, the Constitution itself does not help us with the problem of what should count as "religion"[11] or as an "establishment" thereof.[12] Nor does the text offer much guidance as to the scope and bounds of "arms,"[13] a "search,"[14] a "seizure,"[15] a "taking,"[16] or an instance of "punishment"[17] under the Bill of Rights.

If we can develop a workable approach to a better theory of what should count as speech for First Amendment purposes, we may be able to transfer these techniques, appropriately adapted, to those and other contexts. But first, we must develop such an approach in the already crucially important free speech context. And this will inevitably involve a multi-faceted, mutually interactive, multi-layered approach.

The Origins of the Press Clause, 30 UCLA L. REV. 455, 456 (1983) (noting "the terms freedom of speech and freedom of press have been used more or less interchangeably" with no more expansive rights typically accorded under the latter formula). But if we follow that route, we just add to the importance of arriving at our best possible view of what should count as "speech."

11. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791 (1997).

12. Of course, the Establishment Clause is often read to prohibit more than literal establishment of a state religion; activities tending in such a direction may be prohibited as well. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992); *id.* at 609, 620 (Souter, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 678 (1984). But again, our ability to decide what might be, or what tends toward, an establishment of religion will often depend on our underlying view of what constitutes "establishment" in the first place.

13. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791–92 (2008), for a recent discussion noting several controversies even in this relatively concrete area.

14. *See, e.g.*, Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005).

15. *See, e.g.*, Kerr, *supra* note 14; *see also* Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What Is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1990); Susan M. Kuzma, *Seizures Under the Fourth Amendment: Let's Cut to the Chase*, 18 AM. J. CRIM. L. 289, 289 (1991) ("Defining the term 'seizure' has proved difficult . . . .").

16. For an example providing a sense of the complexity of recognizing a constitutional "taking," see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 534 U.S. 1063 (2001). *See also* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings As Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 56 (1990) ("[T]he more effort the Court has devoted to the issue, the more confused and complex its takings doctrine has become." (citing Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989))).

17. *See, e.g.*, Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1667–68 (1980); Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1610 (1996) (noting that "modern Eighth Amendment discourse has consisted of a competition among three flawed definitions of punishment"). For merely one contemporary punishment issue, see *United States v. Lawrence*, 548 F.3d 1329, 1333 (10th Cir. 2008) (Sex Offender Registration and Notification Act as "nonpunitive in its purpose").

II. STARTING AT THE BEGINNING: THE LIMITED ROLES OF CONSTITUTIONAL TEXT AND ORIGINAL CONSTITUTIONAL MEANING

The most obvious routes to defining "speech" are largely but not entirely unavailing. The authoritative text of the First Amendment itself is of limited help. The text refers to speech, and more fully to "the freedom of speech,"[18] perhaps in some vague institutional sense,[19] but does not delimit what should or should not count as speech. The text offers here no preamble, as in the Second Amendment's "well-regulated militia"[20] preface, to provide possible guidance.[21]

But suppose we venture beyond the bare text of the First Amendment, in search of some determinate and binding intent of the framers and ratifiers of the Free Speech Clause. Can we ascertain much in the way of an "original meaning" or "original intent," fixing for us the scope and bounds of what should count as speech?

As it turns out, even if we set aside the problems with originalism in general,[22] originalist methods in our context are of little help. Consider, to begin with, the judgment of Professor Stanley C. Brubaker: "The debates in Congress concerning the speech and press clauses shed scant light on the question of meaning. . . . Nor do we find enlightening comments in the state legislatures that considered the amendments or the local newspapers or pamphlets of the time."[23] One of the quintessential framers, Alexander

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18. U.S. CONST. amend. I.

19. The article "the" may suggest a view of "the freedom of speech" as a sort of abstract legal and political institution, formal or informal. But even if so, this leaves the nature and boundaries of that institution hopelessly underdetermined. The humble initial article "the" is emphasized in Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986) and in John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993).

20. *See*, U.S. CONST. amend. II.

21. *See District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), discussing the Second Amendment's preface.

22. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (2d ed. 1997); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495 (1996); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311 (1996). For a lively debate, see ANTONIN SCALIA, A MATTER OF INTERPRETATION (Amy Gutmann ed., 1997) and the commentaries published therein. *See also* R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687 (2008).

23. Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82, 85 (Eugene W. Hickok, Jr. ed., 1991); *see also* J. Harvie Wilkinson, III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. REV. 907, 917 (1992) ("We do not know how the Framers felt about each of the categories of speech which courts have exempted from protection.").

Hamilton, seems even more deeply skeptical: "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"[24]

When an illustrious, near-contemporary framer, Justice Joseph Story, begins to address questions of the scope of First Amendment speech, his attention quickly turns to matters of the structure or nature of the protection accorded to speech. Thus, Justice Story holds that

> the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.[25]

It seems possible to argue that the references here to "opinions" and to a "subject" of speech might suggest a limitation on what should count as speech. Does all the entertaining instrumental music we recognize as First Amendment speech today[26] express an opinion or have a "subject"? Does "opinion" encompass all statements of politically relevant fact? Or we might ask, if only half-seriously, whether silence or wearing a black protest armband counts as speaking, writing, or printing.[27] Justice Story's attention, above, is almost immediately drawn towards further questions of the structure of protection, as in his reference to prior restraint of speech,[28] and to various forms of injurious or subversive political speech.[29] In general, focusing on the constitutional text or the quest for original meaning of speech offers us at best only limited progress.

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24. THE FEDERALIST NO. 84 (Alexander Hamilton).

25. JOSEPH STORY WITH AN INTRODUCTION BY RONALD D. ROTUNDA & JOHN E. NOWAK, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 704 (Carolina Academic Press 1987) (1833).

26. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (referencing the music of Arnold Schöenberg). Actually, some but probably not all, of Schöenberg's compositions can be said to have a subject in a standard sense. *See also* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); Willis v. Town of Marshall, 426 F.3d 251, 259–60 (4th Cir. 2005).

27. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969). For some possible meanings of deliberate silence in particular contexts, see *Lee v. Weisman*, 505 U.S. 577 (1992).

28. *See* STORY, *supra* note 25, at 704.

29. *See id.*

III. PROFESSOR SCHAUER'S FUNCTIONALIST APPROACH AND ITS APPLICATION

The Framers thus offer us, whether we are inclined to accept it or not, only modest guidance on issues of the scope and bounds of speech for First Amendment purposes.[30] But we can still make progress by adding in various other means, singly or in combination. Professor Schauer usefully points out that we will never find a set of words that are both a precise equivalent to the meaning of "speech" in our sense, and also easy to apply judicially.[31] Instead, Professor Schauer refers to speech as a "functional term."[32] More clearly, we can certainly see freedom of speech as a functional idea. As noted below,[33] freedom of speech is recognized for several purposive reasons. Protecting speech at a constitutional level is intended to promote these reasonably well-recognized purposes or values.[34] Functionalism should indirectly help us set the boundaries for what counts as speech for First Amendment purposes.

However, Professor Schauer inadvertently illustrates the difficulty of this boundary-setting process. Immediately, Professor Schauer argues that "[c]onspiracy, perjury, fraud and extortion . . . are all 'speech' in the ordinary sense, yet are not 'speech' under *any* conception of freedom of speech."[35] If any clarification is needed, Professor Schauer then specifies that "[i]t is not that regulation of such acts meets the heightened burden of justification implicit in the Free Speech Principle. Rather, such acts are not within the scope of the Principle at all."[36]

We can certainly see the logic of Professor Schauer's position here. Whatever the special purposes, values, or functions of protecting speech turn out to be, it is unlikely that they will be significantly implicated in the

30. Somewhat more broadly, see RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 28 (1992) (noting some of the difficulties in ascertaining original intent regarding almost any First Amendment interpretive question); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

31. *See* SCHAUER, *supra* note 4, at 91.

32. *Id.*

33. *See infra* Part VI.

34. *See id.*

35. SCHAUER, *supra* note 4, at 92. For further, recent discussion of some categories of "literal" speech excluded from "speech" for First Amendment purposes, see *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52 (1st Cir. 2008) (noting in the end that "the matter remains a doctrinal mystery").

36. SCHAUER, *supra* note 4 at 92. For an intriguing discussion, though not entirely free from confusion, see the "Hit Man" civil-aiding book case of *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 244–45 (4th Cir. 1997) (discussing, e.g., illegal drug recipe books, explosives cookbooks and tax fraud seminars), along with the perceptive analysis in KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 85–87 (1989).

typical[37] case of a written bank robbery hold-up note, with instructions relating to old, unmarked tens and twenties. Or, we could say that just as such a note (supposedly and significantly) implicates one or more of the basic purposes of the Free Speech Clause, so does nearly every other intentional public act—each of which threatening to render the scope of the Free Speech Clause remarkably and pointlessly broad.

Still, we cannot help but think that context and circumstance may sometimes make a significant difference. Suppose, for example, that Cassius and Brutus meet and talk, and that their talk amounts to a criminal conspiracy against Caesar.[38] It may help (to the prejudice of the play) if their lines are more heavily-laden with continuing, overt, and explicit political themes such as legitimacy, abuse of legal authority, and the justification of tyrannicide couched in general and theoretical terms. At some point, we must ask why their discussion favoring tyrannicide does *not* count as political speech when a directly contrary or rebuttal speech at the same level of generality that opposes tyrannicide would count as political speech.[39]

So, instead of immediately adopting Professor Schauer's category of absolutism—i.e., criminal conspiracies simply do not count as speech for First Amendment purposes—we might, in the alternative, bear in mind the basic functions or purposes of protecting speech, while recognizing some appropriate role for context and circumstance.[40] In the Cassius and Brutus example above,[41] it seems natural to say that some, if not all, of what the Caesarian conspirators say amounts to political speech for First Amendment purposes, but that on the basis of whatever judicial test we then care to impose, the conspirators may still be criminally sanctioned. On a

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37. It seems arguable that Robin Hood's interdiction of Prince John's ransom shipment through Sherwood Forest involved political speech for First Amendment purposes. This is not to argue that Robin's theft, itself, amounted to an act of political speech, but that political speech was an important component of the overall act. *See* THE ADVENTURES OF ROBIN HOOD (Warner Bros. 1938).

38. *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

39. For a broad understanding of an "act of expression," including "some bombings, assassinations, and self-immolations," see Alan Haworth's discussion in ALAN HAWORTH, FREE SPEECH 8 (1998) (quoting Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206 (1972)).

40. Professor Schauer himself has more recently argued:

> Legal doctrine and free speech theory may explain what is protected within the First Amendment's boundaries, but the location of the boundaries themselves—the threshold determination of what is a First Amendment case and what is not—is less a doctrinal matter than a political, economic, social, and cultural one.

Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004). Actually, in this area the distinction between legal doctrine and considerations of politics, economics, society, and culture is hardly clear.

41. *See supra* notes 36–39 and accompanying text.

functionalist approach, context and circumstance must limit absolutist or categorical rules as to what can count as speech.

IV. SYMBOLISM, PRE-SYMBOLISM, AND FIRST AMENDMENT "SPEECH"

Perhaps we can simplify the scope-of-speech problem by addressing it from another angle. Some arguable borderline speech cases, including the well-known *O'Brien* draft card burning case,[42] are thought of as "symbolic speech" cases. However, the distinction between symbolic speech and non-symbolic speech might in and of itself be misleading. Professor Larry Alexander has argued that "[a]ll speech employs symbols, whether they be sounds, shapes, gestures, pictures, or any other medium. There is thus no such thing as nonsymbolic speech; there is only speech that employs symbols that are less or more conventional."[43]

Would it help, then, to begin with the idea that all speech is symbolic speech? This seems possible, yet one complication is that many of our borderline speech cases are, like *O'Brien*,[44] thought of as symbolic conduct cases. We must then ask whether the symbolic conduct at issue should count as symbolic speech. This might make a difference because even if we assume that all speech is symbolic, it is less clear that all voluntary conduct is also symbolic.[45] We would still need to distinguish symbolic, voluntary conduct from non-symbolic, voluntary conduct.

And as it happens, there may also be cases of non-symbolic speech, or even cases where the symbolic aspects of the speech in question are legally irrelevant. Professor Hayakawa interestingly takes note of "the presymbolic

42. United States v. O'Brien, 391 U.S. 367 (1968). Professor Eugene Volokh has argued that the original intent was to treat symbolic expression and verbal speech as equivalent for purposes of protection or regulation under the First Amendment. *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059 (2009).

43. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 8 (2005).

44. *See supra* note 42 and accompanying text.

45. Consider the following: If I were to pat my pockets elaborately, as an indication that I am searching for something, but without really searching, this gesture may amount to symbolic conduct, where the conduct conventionally symbolizes my being out of cash. This gesture will of course vary with context and culture. By contrast, if I were to functionally use a handkerchief to clean my glasses, is it inescapable that a symbolic message is intended? Doubtless a Sherlock Holmes-like (or a Doctor Gregory House-like) observer may infer a number of my beliefs from this voluntary conduct, as he could from my overall appearance. (My desire to see slightly more clearly might be one such inference.) But, in typical contexts, have I intended to send this message? And, even if so, have I sent this message, through my conduct, symbolically? This conclusion seems uncertain at best.

character of much of our talk . . . ."[46] He provides an example of warning where someone inadvertently steps off a curb and into the path of an oncoming car.[47] In such a case, the verbal content of what we say, or shout, may be irrelevant.[48] The words uttered may vary almost indefinitely.[49] The warning shout might be in any language, including those not understood by the person stepping off the curb.[50] What matters, according to Professor Hayakawa, "is the fear expressed in the *loudness* and the *tone* of the cry . . . and not the words."[51]

This example shows that we care about non-symbolic speech. What is less clear is whether this type of warning shout implicates any of the major reasons for protecting freedom of speech.[52] Imagine a social Darwinist[53] government's prohibiting the utterance of pre-symbolic warning cries. Even if we thought such a prohibition raised a genuine free speech issue, we might also agree that such cases would be better adjudicated under a substantive due process theory,[54] or perhaps even under equal protection.[55] In general, a focus on symbolism and pre-symbolism can provide us with particular insights, but only within a plainly limited scope of applicability.

V. CAN JUDGES BYPASS THE COMPLEXITIES BY SIMPLY ASSUMING THE PRESENCE OF "SPEECH?"

We thus begin to appreciate the complexities of distinguishing speech from non-speech for First Amendment purposes. At this point, it is natural to wonder whether the courts cannot simply bypass the complexities. Whether the activity of the putative speaker should count as constitutional speech is only a preliminary question. Answering in the affirmative certainly does not resolve the case on the merits in favor of the speaker.

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46. S.I. HAYAKAWA & ALAN R. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 56 (5th ed. 1991).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* ("[I]t doesn't much matter whether someone yells, 'Look out!' or 'Kiwotsuke!' or 'Hey!' or 'Prends garde!' or simply screams, so long as whatever noise made is uttered loud enough to alarm us.").

51. *Id.*

52. *See infra* Part VI.

53. *See, e.g.*, the forthright language of Justice Holmes in *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.") (citation omitted).

54. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

55. This assumes the existence of some recognizable target of such government regulation, as might be found in *Buck*, 274 U.S. at 206–07.

Not surprisingly, a number of courts, when faced with borderline speech, have merely assumed the putative speaker to have engaged in speech for constitutional purposes.[56] Merely for the sake of the argument, speech is assumed, and the court must then find some legitimate way to conclude that even if speech is thus assumed, the regulation can nonetheless be upheld.[57] If the assumed speech would instead be protected by the First Amendment, no bypass can take place.[58] But the theory is that if the government regulation at issue can be upheld whether speech is present or not, the court need not stop to decide the threshold speech or non-speech issue.[59]

This tactic seems defensible at first blush. Certainly there are legitimate interests in judicial economy and in the avoidance of a court's unnecessarily addressing questions at a constitutional level.[60] But there are distinct limits

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56. *See, e.g.*, Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984) ("We assume for present purposes but do not decide" that "overnight sleeping [in a public park] in connection with the demonstration is expressive conduct protected to some extent by the First Amendment.") (finding no First Amendment violation); United States v. O'Brien, 391 U.S. 367, 376 (1968) (draft card burning case) ("[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.") (finding no First Amendment violation); Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 958 (9th Cir. 2008) ("In light of the foregoing we do not reach the question of whether wearing the Top Hatters [motorcycle club] clothing and insignia constituted expressive conduct."); Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 428 n.22 (9th Cir. 2008) ("[W]e . . . assume (without deciding) that wearing clothing different from one's classmates is sufficiently expressive of a student's views about non-conformity to merit First Amendment protection.") (mandatory public school dress codes upheld against compelled speech challenge under intermediate scrutiny standard hypothetically applied); Pinard v. Clatskanie Sch. Dist., 467 F.3d 755, 765 (9th Cir. 2006) ("[W]e ultimately need not decide whether the plaintiffs' boycott of the game constitutes 'inherently expressive' conduct encompassed by the First Amendment, because even if it does the boycott was properly punished under *Tinker*."); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 285–86 (5th Cir. 2001) ("For the purposes of this opinion, we . . . again[] assume without deciding[] that the First Amendment applies to the expressive conduct implicated in the mandatory [public school] Uniform Policy.") (policy on that basis does not, under the *O'Brien* test, violate the students' free speech rights); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 & 441 n.3 (5th Cir. 2001) ("For purposes of this opinion, . . . we assume that the First Amendment applies to the students' choice of clothing.") (finding no First Amendment violation).

57. *See, e.g.*, *O'Brien*, 391 U.S. at 376.

58. *But cf. Jacobs*, 526 F.3d at 428 n.22 (assuming that wearing clothing different from one's classmates warrants First Amendment protection, thus bypassing the question of whether the expression is actually speech or not).

59. *See Pinard*, 467 F.3d at 765.

60. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347–48 (1936) (Brandeis, J., concurring). For discussion, see R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 179–80 (1997); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (emphasizing some underappreciated costs of some forms of *Ashwander* narrowness).

to and costs of this tactic as well. Most obviously, despite the popularity of the tactic,[61] there should be many instances in which no "bypass" of the initial speech or non-speech decision is possible. Indeed, in many cases where a court grants that the claimant's conduct amounts to speech in the constitutional sense, the free speech interests at stake should outweigh the countervailing interests in, say, public orderliness.[62] In all such instances, the outcome of the case differs in accordance with whether speech is found to be present or not. No bypass is thus possible in all such cases.

As well, the bypass approach may tend, on balance, to retard the progressive development and enforcement of First Amendment rights. This is a broad-ranging and complex matter that cannot be treated in detail here.[63] In summary fashion, though, we can say that qualified immunity protects many individual government actors from personal liability where the plaintiff cannot show that the free speech right in question was clearly established, usually at a rather specific level of detail,[64] at the time of the alleged violation.[65]

The problem, in our context, is that the Court's bypassing the question of whether speech, or any kind of free speech right, is present in a given case impairs any future plaintiff's ability to show that the free speech right in question was clearly and specifically established. How could it have been established if prior courts had merely assumed, without actually ruling upon, its existence?[66] It is not difficult to imagine that judicially minimizing the scope of personal liability in any context may affect the willingness of government actors to engage in the underlying, challenged behavior.[67]

The bypass strategy is also disturbing in more subtle ways—some clear, some speculative. For one thing, the First Amendment seems central to our

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61. For a mere sampling, see the cases cited *supra* note 56.

62. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939) (upholding leaflet distribution in the street against (indirect) littering concerns); Terminiello v. City of Chicago, 337 U.S. 1 (1949) (political speech, even of an insulting sort, outweighs risks of public convenience or unrest); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (series of obstacles to Skokie march by Illinois Nazis all struck down as violative of First Amendment). *See also* Associated Press, Judge: Blaring Your Car Horn Is Not Free Speech (June 9, 2009), http://www.msnbc.msncom/id/31192720/ (quoting Judge Richard J. Thorpe's ruling that "[h]orn honking which is done to annoy or harass others is not speech").

63. *See generally* R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1 (1989), *See also, e.g.*, Behrens v. Pelletier, 516 U.S. 299 (1996); Johnson v. Jones, 515 U.S. 304 (1995); Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (construing and elaborating on 42 U.S.C. § 1983 and an implied qualified immunity defense); Pearson v. Callahan, 129 S. Ct. 808, 813 (2009) (modifying the requirement under *Saucier v. Katz*, 533 U.S. 194 (2001), that some decision be made on the constitutional merits before deciding the qualified immunity issue).

64. *See, e.g.*, *Anderson*, 483 U.S. at 640–41; Morse v. Frederick, 551 U.S. 393 (2007).

65. *See* Wright, *supra* note 63, at 4–5.

66. *See supra* note 56 for cases illustrating this point.

67. We again bypass certain complications addressed in Wright, *supra* note 63.

core, collective self-understanding as a broadly-liberal constitutional democracy.[68] If this is so, can it be healthy to repeatedly confess that we cannot confidently draw the most fundamental distinction involved on any principled, or even merely pragmatic, basis? And, more speculatively, is there not some risk that we may wind up unintentionally undervaluing, and perhaps in some cases trivializing, freedom of speech through our frequent recourse to the bypass tactic?

On this latter point, we might wonder whether judges may sometimes unconsciously bias their valuation of what they, for the sake of argument, merely assume to be speech. A mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar. Freedom of speech is, after all, only partly a matter of the abstract calculations of interests. Importantly, it is also a matter of emotion,[69] of commitment, and of collective self-image and identity.

By analogy, there may be a difference in how we are willing to treat a hypothetically-assumed human being and an unmistakable individual human being who stands before us. This is not to suggest that, for example, an item of clothing like a lettered jacket is more vivid and concrete when we declare it to be speech than when we merely assume it to be so. But when we genuinely and fully recognize some item, conduct, or symbolic activity to be speech, we have perhaps only then brought all of our values and emotional associations with free speech fully into play. And again, at a subconscious level, a judge must know that somehow underplaying—emotionally or otherwise—the value of the merely-assumed speech may help justify the bypass. Only if the assumed speech is deemed to be outweighed by the conflicting governmental interests can the problem of the scope of speech conveniently be left unresolved.

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68. A sense of this can be drawn from LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 14–15 (Irving Dilliard ed. 1959). Or one could compare one's intuitive sense of the First Amendment with the discussion in JOHN STUART MILL, ON LIBERTY 75–118 (Gertrude Himmelfarb ed., 1984) (1859). Jurisprudentially, see, *Whitney v. California*, 274 U.S. 357, 375–79 (1927) (Brandeis, J., concurring) *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ohio law that failed to distinguish mere advocacy from incitement to lawless action held to be in violation of First and Fourteenth Amendments).

69. For merely one aspect of the relationships between free speech and emotion, see R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003). Perhaps the best statement of the emotive power and appeal of freedom of speech is set forth by Justice Brandeis's concurrence in *Whitney*, 274 U.S. at 375–79 (Brandeis, J., concurring).

Something of this latter argument is clearly suggested by Justices Marshall and Brennan, dissenting in the *Clark* "sleeping in the park" case.[70] Marshall and Brennan forthrightly declare the sleeping activity in context to be symbolic protest speech under the First Amendment,[71] and then point out one risk of merely *assuming* it to be so: "[t]he Court thereby avoids examining closely the reality of respondents' planned expression. The majority's approach denatures the respondent's asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgment."[72] Perhaps a loose analogy could be drawn to the difference, in a jury trial, between merely stipulating in abstract terms to some admittedly-damaging fact, and having that fact actually proved to the jury in some graphic, vivid fashion that casts one's client in a new and unfavorable light.[73]

We may say, in sum, that courts cannot consistently and fairly bypass the distinction between speech and non-speech in the constitutional sense by merely assuming its presence and still upholding the regulation. In many of the cases in which they seek to do so, there are a number of important risks and costs associated with this bypass tactic.[74]

Based on the results so far, the best course is to make as much progress as we can in clarifying the speech and non-speech distinction, while simultaneously appreciating the limits of the various approaches discussed above.[75] Surely, in a broadly pragmatist culture such as our own,[76] we should continue to focus on the crucial purposes, functions, and values sought to be served by distinctively recognizing speech as a constitutionally valued category.

We must also admit that there is no unique and entirely uncontroversial list of the values thought to underlie the Free Speech Clause.[77] But it is fair to say that three basic values[78] arise repeatedly in mainstream accounts of

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70. *See* Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 301, 302 (Marshall, J., dissenting).

71. *See id.* at 301 (Marshall, J., dissenting).

72. *Id.* at 302.

73. For some general theory on this point, see *Old Chief v. United States*, 519 U.S. 172, 186–88 (1997).

74. *See supra* notes 60–68 and accompanying text.

75. *See supra* notes 18–73 and accompanying text.

76. *See generally* CLASSICAL AMERICAN PRAGMATISM: ITS CONTEMPORARY VITALITY (Sandra B. Rosenthal, Carl R. Hausman & Douglas R. Anderson eds., 1999).

77. Even if such a list existed, we could hardly assume that one or more of the listed values could not possibly be promoted as well by constitutionally protecting individual activities distinct from speech—perhaps a right to a basic education. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

78. Each of these three values is classically articulated in MILL, *supra* note 68, and in the modern American jurisprudential context by Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963); Kent Greenawalt, *Free Speech Justifications*, 89

such matters, even where there are differences in emphasis. First is the value of the pursuit of truth, or at the very least, the possibility of truth, in some important sense of the term.[79] Second is the value of a stable, responsive, democratic government and administration.[80] Third, and finally, would be the value of individual or group self-actualization, development, self-realization, and autonomous decision making in some recognizable sense.[81]

We can abbreviate these basic free speech values as truth, democracy, and self-realization. To those with a certain cast of mind, it would be very tempting to decide free speech questions—including questions of what should count as speech for constitutional purposes—by direct and immediate recourse to these widely recognized free speech values. The basic free speech values are an obvious reference point. In the simplest case, if the act of categorizing some activity an instance of speech were to distinctively promote the one of the above-mentioned free speech values, the activity would count as "speech." If, on the other hand, labeling that activity "speech" would not promote or implicate any of the basic free speech values, then the activity would not, on this direct and immediate approach, count as speech.

VI. THE INTERACTIVE AND COMPLEMENTARY ROLES OF THE BASIC FREE SPEECH VALUES, GENERAL RULES, MID-LEVEL HEURISTICS, AND SPECIFIC CONTEXTS AND CIRCUMSTANCES

Whatever the appeal of this direct and immediate focus on free speech values in themselves may be, we must admit that the case law's

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COLUM. L. REV. 119 (1989); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137 (1984).

79. *See supra* notes 18–73 and accompanying text; *see also* JOHN MILTON, AREOPAGITICA AND OF EDUCATION 6 (George H. Sabine ed., 1951) (1640) ("'Tis true, no age can restore a live, whereof, perhaps, there is no great loss; and revolutions of ages do not oft recover the loss of a rejected truth, for the want of which whole nations fare the worse."). Among the contemporary literature, see William P. Marshall, *In Defense of the Search For Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995) and Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1987).

80. *See supra* note 77; *see also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–69 (1992); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY (2001).

81. *See generally* Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998).

pragmatism[82] does not usually take such a form. More typically, courts develop tests at a level of generality somewhere between the ultimate values and purposes at stake and the concrete circumstances and facts of any given case.[83] Thus, courts typically do not ask directly whether some instance of alleged obscenity promotes any of the recognized free speech values; they more directly apply something like the particularized *Miller* test.[84]

Perhaps attempting to decide cases of what counts as speech by direct reference to the basic free speech values by themselves would enmesh courts in unnecessary abstraction, generality, and indeterminacy.[85] This certainly does not mean that either courts or theorists should endorse but then practically ignore free speech values. On the one hand, broad free speech values by themselves cannot replace well-crafted specific and contextualized judicial tests. On the other hand, if we never compare our cases on the scope of speech with the basic aims and values we intend to promote by protecting free speech, we would eventually risk an arbitrary, inconsistent, or misguided set of case law in this respect.

This conclusion suggests that, though we do not appeal directly to the free speech values in order to determine what should count as speech, we should recurringly check our results in such cases by some indirect application of those values. In particular, we have at our disposal the technique of "reflective equilibrium."[86] In the simplest case, this technique would suggest that we fine tune our understanding of both what should count as speech and the precise contours of the free speech values by a sort of back-and-forth, or reciprocal reference, between each in light of the other. In the end, this ongoing process of mutual testing and adjustment may lead us to revised understandings of the proper scope of speech, of our basic free speech values, or both.

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82. *See, e.g.*, THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris R. Dickstein ed., 1999).

83. In the various contexts of libel, obscenity, or public employee speech, courts do not simply hold the facts up alongside the basic free speech values; instead, courts develop and apply various contextualized tests. *See supra* note 2.

84. *See* Miller v. California, 413 U.S. 15, 23–24 (1973).

85. For discussion of some related problems, see generally R. George Wright, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 TENN. L. REV. 335 (2001).

86. The crucial source of the technique of "reflective equilibrium" is JOHN RAWLS, A THEORY OF JUSTICE 20, 46–51 (2d prtg. 1972). *See also* Norman Daniels, Reflective Equilibrium, Stanford Encyclopedia of Philosophy (Apr. 28, 2003), http://plato.stanford.edu/entries/reflective-equilibrium.; Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979). For legal application of the technique, see Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990). Relatedly, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1991); R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1 (2002).

Thus, at any point in the analysis of what counts as speech, we should feel free to assess whether any particular theory, test, or concrete result best comports with our current understanding of the relevant basic free speech values. This reflective equilibrium technique can certainly be applied at any stage of our own analysis below.

As a typical first step in determining whether some activity, or some general category of activity, should count as speech, we should first look, at least for a moment, for the nearly ideal: a cheaply, and easily-applied, reasonably-accurate, yet quite simple set of categories, into which the putative instance of speech or type of speech can be placed. Suppose, by analogy, we wish to discover whether some number counts as a prime number or not. It will be helpful if we already have a category—imperfect, but typically useful—of "not prime because divisible by two." If the number in question is indeed divisible by two, then our simple and reasonably accurate categorical rule and classification will typically steer us right, at low cost. The value, in proper contexts, of general rules is thus clear.

In the more general, legal realm, Professor Richard Epstein has emphasized the value of employing relatively broad, simple, predictable, and easily applied rules and categories when resolving even complex cases.[87] And in our cases, simple categorical rules will often have value for judicial attempts to classify the activity in question as speech or not. For example, in the rare cases in which a standard published text may not fall within the scope of the Free Speech Clause,[88] we may be better-off accepting the published text as speech, whether then-legally sanctionable or not, on the basis of its categorical status as a recognizable book. A court might instead launch into a much more contextualized, nuanced, and detailed inquiry as to whether speech really is involved. It is hardly clear whether such a costlier inquiry would usually pay off in terms either of outcome accuracy or outcome predictability.[89]

On the side of exclusion, we might be well-advised to adopt the broad, simple, categorical rule that speech for First Amendment purposes requires

87. *See generally* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995). For commentary, see Joseph P. Tomain, *Simple Rules for the Regulatory State*, 36 JURIMETRICS J. 409 (1996) (reviewing RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995)) and Steven Walt, 109 ETHICS 193 (1998) (reviewing RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995)). *See also* R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715 (2000).

88. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 263–64, 267 (4th Cir. 1997) (finding "Hit Man," a 130 page manual about effective murder techniques with unusual party stipulations, an extreme case under Brandenburg).

89. For the more generally applicable logic, see generally EPSTEIN, *supra* note 87.

some relevant, voluntary act on the part of the speaker.[90] But where cheaply and easily applied, or where simple and reasonably accurate categorical rules are not available, judges may, at the opposite extreme, make highly contextualized and circumstance-sensitive inquires into whether speech is involved in a given case.

Such highly contextualized inquires into whether a specific activity amounts, under the circumstances, to speech may often be both necessary and worthwhile. We can refer to these kinds of inquiries as akin to an approach to moral philosophy known as "particularism."[91] Moral particularism, and particularism as applied by analogy to the scope of the speech problem, distrusts and de-emphasizes broad rules, principles, sweeping tests, and abstract or uniformly applied standards.[92] Instead, particularism emphasizes recourse to analogies, hypotheticals, images, stories, parables, fables, legends, myths, dreams, narratives, concrete incidents, and other, similar techniques in deciding individual cases.[93] But particularism, no less than general rules, has limits on its scope of useful applicability.

Mid-way between broad, categorical rules[94] on the one hand and context-intensive particularism[95] on the other are what we might call middle-range heuristics. That is, we can imagine techniques that cannot qualify as uniform, but are still of broader applicability than, say, a context-bound

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90. For a reasonably close case, see HAYAKAWA & HAYAKAWA, *supra* note 46, at 56 (discussing how the voluntary action of creating sounds to express thoughts has remained despite the expansion of human consciousness). Or, in the appropriately narrow context, consider a completely involuntary and unintended public grimace, or startled reaction, in response to some politician, for which the hapless, reacting party is then punished. Even if we do not treat utterly involuntary reactions as "speech," objection to punishment for such reactions, perhaps on Substantive Due Process or Cruel and Unusual Punishment grounds, is still possible. *See, e.g.*, *Constitutional Law—Eighth Amendment—Ninth Circuit Holds that "Involuntary" Conduct Cannot Be Punished*, 120 HARV. L. REV. 829 (2007) (discussing *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (alleged punishment for involuntary, elemental acts of homeless persons)).

91. The leading exposition of moral particularism is JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES 73 (2004) ("Particularism [is where] the possibility of moral thought and judgment does not depend on the provision of a suitable supply of moral principles"). *See also generally* MORAL PARTICULARISM (Brad Hooker & Margaret Oliva Little eds., Oxford Univ. Press 2003) (2000); CHALLENGING MORAL PARTICULARISM (Mark Norris Lance et al. eds., 2008). For a sustained critique, see SEAN MCKEEVER & MICHAEL RIDGE, PRINCIPLED ETHICS: GENERALISM AS A REGULATIVE IDEAL (2006). For legal applications, see R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 HOFSTRA L. REV. 195 (2009).

92. *See generally* DANCY, *supra* note 91 at 73–94. *See also* Jonathan Dancy, Moral Particularism, Stanford Encyclopedia of Philosophy (rev. ed. Jan. 14, 2009), http://plato.stanford.edu/entries/moral-particularism.

93. *See supra* note 89.

94. *See supra* notes 84–87 and accompanying text.

95. *See supra* notes 88–90 and accompanying text.

intuition. These middle-range heuristics, too, may play a useful complementary role in classifying speech.

Among such possible middle-range heuristics, consider, for example, taking into account the realistic costs a putative speaker would have faced in turning a borderline case of marginal speech into a substantially easier case by focusing on the precise question of speech or non-speech for constitutional purposes. Suppose that a putative speaker casually left his or her speech somewhere near the hazy borderline of what constitutes speech, but at very low cost could, without distorting any message or abandoning a desired audience, have easily presented a much clearer case of speech.

In such a close case, we may assume the speaker has, in effect, heedlessly imposed unnecessary costs on the judicial system in resolving a difficult issue where the costs to the speaker in every relevant respect of presenting an easier case were low. In such cases, one could argue that there is, all else equal, an argument[96] for deciding the unnecessarily close and costly issue[97] of speech or non-speech against the heedless putative speaker. Such an argument would have a basis in fairness and incentives to efficiency.[98]

This technique is related to the linguistic philosopher Paul Grice's much broader "Cooperative Principle."[99] Grice's injunction is to "[m]ake your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."[100] A related idea is Professor P.F. Strawson's observation that we can often, though hardly always, offer a "force-elucidating comment"[101] on our own message.[102]

As one type of example concerning the possible judicial use of this particular middle-range heuristic technique, consider the remarkably numerous appellate cases posing the issue of whether nude sunbathing

96. For a variant of this basic argument in a related context, see R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 31–32 (1987) (developing applicable clarifications).

97. This particular technique would have no application for easy cases in either direction—to either clear "speech" or to clear "non-speech"—where the technique would be unnecessary in any event.

98. *See* Wright, *supra* note 96, at 31–32.

99. PAUL GRICE, STUDIES IN THE WAY OF WORDS 26 (1989).

100. *Id.*

101. P.F. Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439, 451 (1964) (emphasis omitted).

102. *See id.*

should count as speech for First Amendment purposes.[103] If we consider either the category of nude sunbathing, or the particular instance of nude sunbathing at issue, to be either clearly speech or else clearly not speech, then we will have no need for middle-range heuristics. But if, on the other hand, we take the nude sunbathing case at issue to be difficult, or somehow costly to decide, then we may find value in such middle-range heuristics.

In particular, in such a case we might ask whether the nude sunbather—the putative speaker—could cheaply and easily, and without distorting the message or abandoning the preferred audience, have presented a much clearer instance of speech. In effect, the courts could ask whether such a speaker could have easily turned a judicially costly borderline case of speech into a clear or mainstream case of speech.

As to how a putative speaker could practically undertake such a task, the limits are set, in part, merely by imagination. In general, one could conduct oneself before, during, and after the nude sunbathing—again, assuming the activity itself presents a close case of speech—in such a way as to enhance the ratio of speech-elements to non-speech elements. One could also create in advance a clear, explanatory website or Facebook page. One could also widely distribute thoughtful literature as part of a significant but low cost campaign. Or one could explicitly proselytize before, during, and perhaps even after the arrest.

None of these speech-enhancing activities, even in combination, can guarantee that an instance of nude sunbathing will be judicially treated as speech, whether ultimately protected or not.[104] Courts may categorically regard nude sunbathing cases as easy, non-speech cases where the above heuristic would not apply. It is also likely that some courts, in this and other contexts, simply fail to carefully distinguish between non-speech and speech in a way that can be appropriately regulated.[105] But, if a court does regard a

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103. *See, e.g.*, S. Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984) (no First Amendment right to sunbathe or otherwise publicly associate in the nude); Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988) (prohibition of nude sunbathing valid as against women who wished to bathe in the nude in a national park in order to protest exploitation of women in American society); DeWald v. Wyner, 674 So. 2d 836, 838 n.1, 839 (Fla. Dist. Ct. App. 1996) (otherwise nude sunbather literally covering self with printed copy of the Bill of Rights); People v. Hollman, 500 N.E.2d 297 (N.Y. 1986) (nude sunbathing insufficiently "expressive" to invoke First Amendment protection in the absence of some other form of protected expression); Lacour v. State, 21 S.W.3d 794 (Tex. App. 2000) (nudity on remote public beach as mere conduct as opposed to expressive conduct protected by First Amendment).

104. Some such activity was undertaken by the putative speaker in a number of the cases cited above, to minimal legal effect. *See, e.g.*, *DeWald*, 674 So. 2d at 838 n.1, 839.

105. Further examples include "casual chit-chat" cases where a lack of precision in distinguishing non-speech from speech is, on balance, subject to regulation under the circumstances. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (casual chit-chat case within the context of public employee free speech); Trejo v. Shoben, 319 F.3d 878, 884–87 (7th Cir. 2003) (casual chit-chat effectively treated as both non-speech for First Amendment purposes and, on balance, as unprotected speech); Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990) (ambiguous treatment of casual chit-chat).

particular nude sunbathing case as a borderline speech case, the application of the above mid-level heuristic test should be useful in making the initial speech versus non-speech distinction.

At some point, however, our useful middle-range heuristics will run out. We must then, in complementary fashion, draw on some combination of our various, broader theoretical understandings of speech and our best, particularized understandings in those contexts—again with constant regard to the basic purposes of protecting speech in the first place.[106]

VII. THE SUPPLEMENTARY CONTRIBUTIONS OF THE GENERAL THEORISTS OF MEANING

Suppose a judge must decide whether to credit some putative speech with being speech in the constitutional sense. We might consider the possible contributions of the general theorists of meaning. Theorists of meaning can tell us that, for example, we have several possible places to look for meaning. We could look for sentence meaning in the mind of the speaker, but the speaker may be speaking less than forthrightly, for legitimate or illegitimate reasons.[107] Or we could look for sentence meaning

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In *Swank*, Judge Posner argues:

> The purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat . . . is unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment.

Id. at 1250–51 (citation omitted). *See also* King v. Fed. Bureau of Prisons, 415 F.3d 634, 637 (7th Cir. 2005) ("[A]n order to sell, like a threat intended to intimidate[] is not the kind of verbal act that the First Amendment protects." Such speech "has no connection to the marketplace of ideas and opinions, whether political, scientific, aesthetic, or even commercial.") (citations omitted). One uncontroversial clarification would be that the Free Speech Clause protects not only public expression, but also preliminary activities thereto, such as the opportunity to think, to organize one's thoughts, and to record one's thoughts and other researched material in forms not intended for public dissemination. Materials such as a diary, a book of observations, or a paper or electronic notebook might beintended to serve only as a resource for later public speech. Perhaps more controversial is Judge Posner's apparent reduction of the purposes of freedom of speech to merely protecting the marketplace of ideas. It is unclear, for example, that protecting the marketplace of ideas also captures all that is commonly intended by the self-realizational value of free speech. *See supra* notes 75 & 78 and accompanying text.

106. *See supra* note 86 and accompanying text (discussing the technique of reflective equilibrium).

107. *See* C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM 192–93 (Harcourt

in the mind of the listener, but the listener could variously misconstrue an intended meaning.[108] So we might then say that "[t]he meaning of any sentence is what the speaker intends to be understood from it by the listener."[109]

This, by itself, is only a minimal result. Yet, it does suggest, against the background of the basic purposes of free speech, that a speaker, for free speech purposes, must intend his or her speech to be understood by some listener in some more or less determinate fashion. In the absence of the speaker's intent to promote some more or less determinate understanding, we may be skeptical that speech in the constitutional sense is present. Some protectable speech, even profoundly valuable speech, may not be perfectly understood even by the speaker, and the speaker's intent with respect to audience comprehension may also be hazy. Moreover, audience members will often differ dramatically in their capacities to understand the message being conveyed. But beneath some baseline level of intent—which may depend on context—it will be difficult to maintain that the basic free speech values are distinctively implicated.

Whether a speaker's intention to be more or less distinctly understood by one or more members of an audience on a significant subject is sufficient, as well as necessary, for constitutional speech is a more difficult question. Suppose a political dissenter seeks to use an electronic sound system to address a willing audience on a political subject, and is then arrested on a minor charge when the sound system repeatedly generates only disturbing feedback, but absolutely no speech, amplified or otherwise. Presumably, we would want to allow the would-be speaker to raise some sort of free speech defense. But in such a case there seems to be only an intent to speak, or to convey a message, and no actual speech.[110] Moreover, perhaps some members of the audience anticipate the intended message. The role of intent in constitutional speech is thus surprisingly complex.

Brace Jovanovich, Inc. 1989) (1923).

108. *See id.* at 193.

109. *See id.* (emphasis omitted). As Robyn Carston highlights, obvious complications arise, particularly in situations where the speaker expresses irony. *See* ROBYN CARSTON, THOUGHTS AND UTTERANCES: THE PRAGMATICS OF EXPLICIT COMMUNICATION 15 (2002) ("[T]here is often a divergence between what a person says and what she means, between the meaning of the linguistic expression she uses and the meaning she seeks to communicate . . . ."); *see also* GRICE, *supra* note 99, at 219 (explaining the concept of meaning as involving an intent to induce a belief in the audience where the audience is to recognize and, at least in part, be motivated by such a speaker's intent).

110. It is not clear whether the law generally recognizes a distinctive "attempted speech" defense. *See, e.g.*, Pesek v. City of Brunswick, 794 F. Supp. 768, 798 (N.D. Ohio 1992) (noting that reasonable officials might differ on whether "attempted speech" was protected by the First Amendment).

VIII. CONTEMPORARY GENERAL THEORIES OF AMBIGUITY AND VAGUENESS AND THEIR PRAGMATIC APPLICATION

Often, a speaker's intentions with respect to communication are complex and multi-layered.[111] A speaker's intentions can be ambiguous, and "ambiguity" itself can have several forms.[112] But ambiguity is usually not at the heart of the speech versus non-speech problem. Suppose, for example, that a public school student is accused of wearing a prohibited gang symbol in school, and that the student responds by arguing that he or she intends the symbol (more or less plausibly) in its more historical or religious sense.[113] Such a case may represent an ambiguous communication, yet it seems unlikely that the symbol will count as speech only if interpreted in one of these two ways but not the other. It seems equally inequitable to discount the symbol as speech because it is ambiguous as between the two meanings, both of which might in and of themselves count as speech. It is not as though the symbol is so broadly and variously ambiguous, with no timely clarification by the putative speaker, that we would conclude that any possible speaker intent has drowned in a sea of ambiguity.

Thus, a speaker's ambiguity, at least up to a point, will not usually deprive an expression of its character as speech.[114] Instead, the more typical problems at the boundaries of speech are the arguable insufficiency of any intended meaning, the arguably excessive vagueness of the putative speech, and the underlying vagueness of the idea of speech itself, in both the standard dictionary and the constitutional senses.

For example, the speech versus non-speech problem in the flag-burning case of *Texas v. Johnson*[115] was not that the act of burning the flag, in context, was ambiguous between two distinct meanings, one of which sufficed for First Amendment purposes and one of which did not. Instead, the more attractive approaches to the case would have been to find Johnson's (perhaps ambiguous) symbolic act to be somewhat vague and

111. *See, e.g.*, Strawson, *supra* note 101, at 452.

112. *See* WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY 5–6 (New Directions 1966) (1930) ("'[A]mbiguity' itself can mean an indecision as to what you mean, an intention to mean several things, a probability that one or other or both of two things has been meant, and the fact that a statement has several meanings.").

113. *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1308 (8th Cir. 1997).

114. Nor does this seem to depend systematically on whether the speaker's ambiguity is intentional or not; speakers sometimes avoid maximum clarity for practical or political reasons. See, for example, the explicit guardedness of the defendant's speech in *Debs v. United States*, 249 U.S. 211 (1919) (upholding Debs's conviction).

115. Texas v. Johnson, 491 U.S. 397 (1989).

inarticulate, but to nonetheless count it as symbolic speech,[116] or else to find excessive vagueness in his act, and therefore an insufficiency of any intended message.[117] A similar analysis would perhaps apply to the controversial student banner in *Morse v. Frederick*,[118] otherwise referred to as the "Bong Hits 4 Jesus" case.[119]

What, then, does the literature of vagueness tell us about either the vagueness of speech itself, or about individual expressions that are near the boundaries of constitutional speech because of their vagueness? The technical theory of vagueness has been developed in directions extending beyond our present needs.[120] For our purposes, some basic insights into the humblest cases of vagueness are needed, as in the vague idea of baldness, and a consideration of whether some borderline case counts as one of baldness or not.

We have already committed ourselves to a purposive, functional, and pragmatic approach to deciding what counts as speech, based ultimately on promoting the crucial values that underlie our desire to protect free speech.[121] A pragmatic approach to the question of whether someone is bald or not would focus on what practical interests are at stake in such a case. A similarly pragmatic approach to whether certain activity should count as speech would also focus on the values and interests[122] at stake, in context,[123]

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116. *See id.* at 406.

117. *See id.* at 432 (Rehnquist, C.J., dissenting) ("[F]lag burning is the equivalent of an inarticulate grunt or roar . . . .").

118. Morse v. Frederick, 551 U.S. 393 (2007).

119. *See id.* at 396. For a sense of the insufficiency of meaning claim, see *id.* at 444 (Stevens, J., dissenting) ("This is a nonsense message, not advocacy.").

120. *See, e.g.*, Trenton Merricks, *Varieties of Vagueness*, 62 PHIL. & PHENOMENOLOGICAL RES. 145 (2001) (distinguishing metaphysical-level vagueness (vagueness as "built-in"); epistemological vagueness (vagueness as a matter of our ignorance of some relevant fact); and linguistic vagueness, but denying that linguistic vagueness should count as a separate category of vagueness); Keith C. Culver, *Varieties of Vagueness*, 54 U. TORONTO L.J. 109, 115 (2004) (noting the discussion of "no less than ten varieties of vagueness"). For one example of (vaguely) related but distinct attempts at analyzing vagueness, see Roy A. Sorensen, *Vagueness Within the Language of Thought*, 41 PHIL. Q. 389, 389 (1991) ("The simplest explanation is that a [vague or] borderline statement is an unknowable truth or falsehood."); *see also* Max Black, *Vagueness: An Exercise in Logical Analysis*, 4 PHIL. SCI. 427, 429 (1937) (discussing vagueness as inherent in scientific discourse); George Lakoff, *A Note On Vagueness and Ambiguity*, 1 LINGUISTIC INQUIRY 357, 357 (1970) ("It is generally agreed that certain sentences are ambiguous, while others are vague."); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491 (1994); R.G. Swinburne, *Vagueness, Inexactness, and Imprecision*, 19 BRIT. J. PHIL. SCI. 281 (1969); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 513 n.9 (1994) (defining "vagueness," and observing that "[t]he terms 'vagueness,' 'contestability,' and 'ambiguity' are themselves vague, contestable and ambiguous").

121. *See supra* notes 76–81 and accompanying text.

122. *See* Delia Graff, *Shifting Sands: An Interest-Relative Theory of Vagueness*, 28 PHIL. TOPICS 45, 49–54 (2000).

123. *See* Diana Raffman, *Vagueness and Context-Relativity*, 81 PHIL. STUD. 175, 175 (1996) ("The correct application of a vague predicate varies with context.").

in such a determination. Most simply put, would we more optimally promote the recognized free speech values[124] by classifying a given activity as speech, or by denying that activity recognition as speech?

Clearly we should bear in mind that neither option, calling almost everything speech, nor calling almost nothing speech, is likely to optimally promote the crucial reasons for protecting speech in the first place.[125] Too narrow a view risks repressively excluding novel methods of communication that clearly implicate the free speech values.[126] Too broad a view risks diluting and trivializing, and eventually even subverting, the constitutionally fundamental status of speech.[127]

A pragmatic, contextual, interest-based approach to classifying borderline cases of speech is thus justified by the academic literature.[128] Of course, not all the pragmatic considerations, and not all the free speech values in particular, will always line up neatly and unequivocally either for or against counting some particular activity as speech.[129] Particularized judgment, guided by principle, will then be necessary in such cases.[130]

Nor can we eliminate all traces of vagueness in the general idea of speech, or in classifying particular acts as either speech or non-speech. As the philosopher J.L. Austin once observed: "The actual world is, to all human intents and purposes, indefinitely various; but we cannot handle an indefinitely large vocabulary; nor, generally speaking, do we wish to insist on the minutest detectable differences . . . ."[131] Any attempt to eliminate vagueness in classifying speech would be unworkably complex, and would

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124. Of course, in any given case the various free speech values may point in contrasting directions, or may appear on both sides of the argument. *See, e.g.*, Wright, *supra* note 85.

125. Calling almost everything speech would involve a movement in the direction of overall conduct libertarianism, or freedom of action, of a sort attractive to John Stuart Mill, *supra* note 68, but not clearly inferable from a classic commitment merely to freedom of speech.

126. As in the case of important speech taking the form, for a time, of binary computer code.

127. Protecting too much intentionally-near-to-meaningless speech eventually prompts the question of why we would sacrifice other social values, including peace and quiet or sheer convenience, for such a minimal payoff.

128. *See, e.g.*, Pierluigi Chiassoni, *Jurisprudence in the Snare of Vagueness*, 18 RATIO JURIS 258, 259 (2005) (noting one pragmatic approach to vagueness that involves "extra-linguistic, evaluat[ive] considerations such as justice, fairness, self-interest, social welfare, [and] law's integrity").

129. *See supra* note 124.

130. *See* Culver, *supra* note 120, at 115 ("[P]ragmatic considerations . . . may leave residual pragmatic vagueness where evaluative considerations surrounding the application of an expression do not decisively incline competent application one way or another."); *see also supra* notes 91–92 and accompanying text (discussing the approach of "particularism").

131. J.L. Austin, *How to Talk: Some Simple Ways*, 53 PROC. ARISTOTELIAN SOC. SYSTEMATIC STUD. PHIL. 227, 239 (1953).

doubtless involve its own vague language. Such an attempt would thus not pragmatically promote our relevant interests.

More positively, Professor Jeremy Waldron has noted some value in the vagueness associated with the idea of speech.[132] In particular, Professor Waldron sees value in publicly rethinking and debating the boundaries of speech anew where arguably close cases arise,[133] in part to freshen our sense of the value of speech and of its protection. Such a debate may be very valuable. But if we define speech either too narrowly or too broadly, in light of our basic reasons for protecting speech in the first place, we again risk either repression[134] on the one hand, or dilution and trivialization on the other.[135]

IX. SYNTHESIS, TENSION, AND UNCERTAINTY IN THE SUPREME COURT OPINIONS ON "SPEECH"

With or without the assistance of the academic theorists, the Supreme Court itself has attempted to provide guidance on what should count as speech for First Amendment purposes. The Court declared in *United States v. O'Brien*,[136] the draft card burning case, that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[137] This language, however, does little more than recognize the boundary-drawing problem, as distinct from actually resolving such a problem.

A plurality opinion in the flag desecration case of *Spence v. Washington*[138] declared that in the absence of printed or spoken words, the Court would have to "determine whether [the] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . ."[139] The plurality then focused on "the nature of [the] activity, combined with the factual context and environment in which it was undertaken"[140] in finding the activity sufficiently communicative to amount to protected expression.[141]

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132. *See* Waldron, *supra* note 120, at 539.

133. *See id.*

134. *See supra* note 126 and accompanying text.

135. *See supra* note 127 and accompanying text.

136. 391 U.S. 367, 376 (1968).

137. *Id.*

138. 418 U.S. 405, 409 (1974) (per curiam).

139. *Id.* at 409.

140. *Id.* at 409–10; *see also id.* at 410 (explaining that "the context may give meaning to the symbol").

141. *See id.* at 410.

Later, in *Texas v. Johnson*, another flag burning case, a majority of the Court, again emphasizing the importance of context,[142] imposed a rather demanding test. The majority found sufficiently communicative speech to be present[143] and asked whether "[a]n intent to convey a particularized message was present, and . . . [whether] the likelihood was great that the message would be understood by those who viewed it."[144] It is, however, unclear how rigorously the Court intended this language to be taken.

One crucial consideration in this regard is the Court's apparent backtracking in the subsequent St. Patrick's Day parade case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[145] In *Hurley*, the Court disapprovingly quoted its own prior language in both *Spence* and *Johnson*.[146] The Court concluded that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[147] Further, the majority of the Court in the more recent "Bong Hits 4 Jesus" student banner case of *Morse v. Frederick* seemed to accept the banner's content—admittedly, verbal or printed speech, as opposed to symbolic conduct—as speech for First Amendment purposes.[148] But under the circumstances and context, including the admissions of the purported speaker,[149] it is far from clear that the message, if any, on the banner would pass the *Johnson* test.[150] *Johnson*, again, would require that, in context, "Bong Hits 4 Jesus" reflect

142. *See* Texas v. Johnson, 491 U.S. 397, 405 (1991) ("We have not automatically concluded[] . . . that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred.").

143. *See id.* at 406.

144. Spence v. Washington, 418 U.S. at 410–11.

145. *See generally* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

146. *See id.* at 569.

147. *Id.* (quoting *Spence*, 418 U.S. at 411) (citation omitted).

148. Morse v. Frederick, 551 U.S. 393, 400 (2007).

149. *See id.* The weaker and more diffuse the communicative intent, the more relevant becomes the principle that "[a]n act not intended to be communicative does not acquire the stature of First-Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it." Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 895 (1st Cir. 1988). Consider also the case of a solitary, early-morning jogger who inadvertently inspires an unnoticed onlooker.

150. *See* Texas v. Johnson, 491 U.S. 397, 405 (1991); *see also supra* note 142 and accompanying text.

both an intent to convey a particularized message and a great likelihood that the message would be understood by the audience as intended.[151]

The majority in *Morse* made little effort to fit the banner's message within either, let alone both, of the *Johnson* test considerations. As the majority itself admitted:

> The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.[152]

If we assume that the majority in *Johnson* was endorsing a test consisting of two separate and essential elements, rather than something like merely two relevant factors, it is then difficult to read the *Morse* discussion above as applying the *Johnson* test.

The first element, a speaker's intent to convey a particularized message, is denied, against his own interest, by the "speaker himself."[153] Now, there may be circumstances in which a political dissenter would be better off in denying any intent to deliver any coherent message. But Frederick is hardly in a position to take advantage of the free speech law of public schools[154] if he is not engaging in speech. The testimony of the putative speaker cannot always be decisive on the question of intent. But the typical problem is that of the speaker self-servingly concocting, after the fact, a coherent, particularized intent that was not in existence at the time of speaking.[155]

Certainly, in *Morse*, there was little evidence of any speaker intent to convey any particularized, more or less unequivocal message beyond the

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151. *See Johnson*, 491 U.S. at 405.

152. *Morse*, 551 U.S. at 401 (quoting Frederick v. Morse, 439 F.3d 1114, 1117–18 (2006)) (citation omitted).

153. *See id.*

154. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

155. Commercial barroom nude dancing is almost uncontroversially recognized as speech for First Amendment purposes, presumably on the basis of an imputed message of disinhibition, only dubiously intended by each speaker. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981). Such cases are probably best understood as not requiring that the speaker have subjectively intended any reasonably particularized, determinate message. *See infra* note 160. For perspective, consider that typical social or recreational dancing is generally not counted as speech. *See infra* note 168. Mid-way between the recognized commercial nude barroom dancing speech, noted above, and the non-speech of social or recreational dancing would seem to be allegedly-lewd but recreational dancing, which seems to fall on the non-speech side. *See* Willis v. Town of Marshall, 426 F.3d 251, 257 (4th Cir. 2005).

"speaker's" own disavowal of any such intent. The majority itself cited several possible sorts of audience reactions, but audience reactions do not imply any particularized message, either intended or received. Consider, as the *Morse* majority did,[156] the case of someone who is offended by, or even who deems blasphemous, the speaker's reference to "Jesus," precisely because no particularized speaker message is intended or discernible. Or consider, as the majority also did,[157] the amused reaction of someone who merely enjoys the public mention or use of the phrase "Bong Hits," or the conjoined mentioning of "Bong Hits" and "Jesus," apart from any particularized message received or intended.

As to the second element of the *Johnson* test, we need only note that any great likelihood that Morse's particularized message would have been understood by his audience[158] obviously depended on the existence of the first element of the *Johnson* test, on speaker intent. As well, the majority acknowledged several divergent but reasonable audience reactions,[159] and we have just seen that those audience reactions do not always require either a particularized speaker intent or the understanding of that intent by the relevant audience.[160]

In a typical case, of course, audience members may perceive a fairly wide range of intended messages, and in some cases, only a fraction of the audience will perceive any intended message, let alone the actual intended message. But then, the speaker may intend different messages for different audience members, for various, legitimate reasons. Different messages intended for different audience members should hardly deprive the speech of its character as speech for First Amendment purposes. What can we say, then, of the Court's apparent adoption and then softening of the *Johnson* test in cases such as *Hurley* and *Morse*?[161] As we shall see in specific

156. *See supra* note 152 and accompanying text.

157. *See id.*

158. In *Morse*, the immediate audience consisted of the fellow students, teachers, townspeople, and visitors, but for the speaker, the crucial audience was claimed to be those watching on television. *See supra* note 152 and accompanying text.

159. *See id.*

160. *See supra* notes 156–61 and accompanying text. It is technically possible to find a high likelihood that the speaker's intent would be properly understood by the audience, despite the fact that the actual reactions from the audience give little hint of that. Nevertheless, we would still be missing the first, or particular intent, element under *Johnson*.

161. The Court appeared to focus on whether the conduct at issue in the military recruiter campus access case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (FAIR), 547 U.S. 47 (2006), could be classified as "inherently expressive" or "not inherently expressive." *Id.* at 65. Presumably, what the Court meant is that the conduct of the campus officials was not sufficiently meaningful apart from the closely associated language of disapproval of the military recruitment

contexts,[162] there is value in maintaining touch with some reasonably interpreted version of the first element of *Johnson*, requiring some particularization or determinacy of the speaker's message.[163]

It is doubtful that the culture of free speech would suffer, on balance, if verse that is categorized as pure entertainment nonsense, with no further cultural or political associations, were left outside a standard First Amendment test.[164] The more important point, though, is that some great literature, richly deserving of free speech protection, could pass as speech only under a generously interpreted *Johnson* test.

Consider, for example, the attempts by the great quantum physicists to provide some verbal or conceptual interpretation of their pure mathematical and experimental results.[165] Beyond some point, the clarity or determinacy of meaning of their attempts becomes starkly limited. Certainly, their internally-diverse intended audience may, with great probability, take away somewhat diverging interpretations of the author's message. This state of affairs will also characterize, to an even greater degree, some great literature,[166] as well as great mystic and religious works[167] of various

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policies in question. *See id.* If words and (other) conduct are genuinely inseparable, they should presumably be judged together for First Amendment purposes. But it would be a great mistake to generally focus on whether conduct, or symbolic conduct, or even verbal messages, are "inherently expressive." Typically, if not inevitably, meaning is in part a matter of context. *See, e.g.*, *supra* notes 139–43 and accompanying text. For a related, unduly narrow, non-contextual test, see *Redgrave v. Boston Symphony Orchestra, Inc.*, 885 F.2d 888, 894 n.4 (1st Cir. 1988) ("[C]ancelling a contract is not a traditional form of protest."). Why the courts should look to tradition rather than to context and circumstances is left unexplained. For a slightly broader test, see *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006) (sitting or lying on the sidewalk as "not forms of conduct integral to, or commonly associated with, expression" (quoting Roulette v. City of Seattle, 97 F.3d 300, 305 (9th Cir. 1996))).

162. *See infra* Part XI.

163. Commercialized barroom nude dancing is probably treated as speech not only in view of after-the-fact imputed messages, but also because the activity itself has historically been something of a cultural battleground site, with obvious, broader cultural and political visions and interests at stake. For the unadorned judicial logic, see the cases cited *supra* note 155. For one state case that extends this sort of protection a bit further, see *State v. Ciancanelli*, 121 P.3d 613, 634 (Or. 2005) (actual sex acts as protected under state free speech provision if criminalized only in the course of the expressive content of a "live public show").

164. *But cf. supra* notes 145–50 and accompanying text (discussing the unquestioning "Jabberwocky" protection in *Hurley*).

165. *See generally, e.g.*, 4 NIELS BOHR, THE PHILOSOPHICAL WRITINGS OF NIELS BOHR: CAUSALITY AND COMPLEMENTARITY (Ox Bow Press 1999); WERNER HEISENBERG, PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE (1958). *See also*, NICK HERBERT, QUANTUM REALITY: BEYOND THE NEW PHYSICS, at xiii (1987) (quoting Nobel laureate Richard Feynman as saying "it is safe to say that no one understands quantum mechanics"); This Quantum World, The Real Problem, *available at* http://thisquantumworld.com/ht/index.php?option=com_content&task=view&id=54&Itemid=46 (last visited Feb. 28, 2010) (quoting Roger Penrose to the effect that "quantum theory makes absolutely no sense" and John A. Wheeler as saying "if you are not completely confused by quantum mechanics, you do not understand it").

166. *See, e.g.*, JAMES JOYCE, FINNEGANS WAKE (Penguin Classics 2000) (1939); JOSEPH CAMPBELL & HENRY MORTON ROBINSON, A SKELETON KEY TO FINNEGANS WAKE: UNLOCKING

traditions.[168] More narrowly, there might also be great works, the basic message of which was predictably not grasped, with any precision, by most or all of its initial audience.[169] Some works are ahead of their time, even as to received meaning. And we certainly might want to consider some coded messages to be speech, even though the coded message by itself is unintelligible, at least for its unintended audiences.[170] More generally, our various levels of useful free speech theory shed as much critical light on the Supreme Court cases as the latter do on our theories of speech.

X. TESTING THE SUPREME COURT OPINIONS IN JUDICIAL APPLICATIONS

The primary lesson to be drawn from the above Supreme Court cases on the scope of speech is to adopt the best (i.e., the most value-sensitive for free speech purposes) tests and formulas that we can. But even then, courts should remain sensitive to context and circumstance. Courts should not intellectualize or romanticize the actual context, as in a number of the nude dancing and sex show cases,[171] nor be insensitive to context in ways that miss the point of distinctive forms of speech.[172]

JAMES JOYCE'S MASTERWORK (Edmund L. Epstein ed., 2005) (tracing the structure of Joyce's manuscript six decades after the work's initial publication).

167. *See, e.g.*, ST. THERESA OF AVILA, THE INTERIOR CASTLE (E. Allison Peers ed. & trans., Sheed & Ward 1972) (1577).

168. *See, e.g.*, THE BHAGAVAD GITA (Laurie L. Patton trans., Penguin Classics 2008).

169. Query, for example, whether the legendary, riotous reaction to Igor Stravinsky's musical composition *Rite of Spring* at its premiere in 1913 reflected comprehension and rejection, or at least some element of incomprehension of intended meaning. There is probably a continuum of public understanding regarding initially disliked works. Toward the more censorious, as opposed to simply uncomprehending, end of the spectrum would be the initial, official reaction to Italian scientist Galileo Galilei's scientific work. For a comprehensive documentary account, see THE GALILEO AFFAIR: A DOCUMENTARY HISTORY (Maurice A. Finocchiaro ed. & trans., 1989).

170. *See* Universal City Studios, Inc., v. Corley, 273 F.3d 429, 445 (2d Cir. 2001) ("Communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code. Mathematical formulae and musical scores are written in 'code,' *i.e.*, symbolic notations not comprehensible to the uninitiated, and yet both are covered by the First Amendment."). In a sense, the difference between an elaborate code and a common language is a matter of degree, but the social functions and values of the two may differ. On the other hand, an unbreakable code and a private diary may both be intended ultimately for an audience of only one.

171. *See supra* notes 155 & 163 and accompanying text. As the Court observed in the unprotected (clothed) social dancing case of *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* at 25. For similar logic applied in the agonizingly closer case of recreational dancing that is also allegedly lewd, see *Willis v. Town of Marshall*, 426 F.3d 251, 257 (4th Cir. 2005).

172. *See supra* note 161 and accompanying text (discussing *Rumsfeld v. FAIR*).

Consider, for example, one court's insensitivity to context as a source of intended and received meaning in the case of *Samuels v. New York State Department of Health*.[173] In *Samuels*, a same-sex couple sought and was officially refused a New York State marriage license.[174] The plaintiffs argued that the discriminatory conditions placed on obtaining a marriage license amounted to a violation of their free speech rights.[175]

On the merits, this claim would seem to be unusually broad. Could every imaginable official rejection of every claim against the state amount to an unjustified restriction of the free speech rights of the claimant? Or even a justified restriction of those free speech rights? Would this not amount to "free speech overload?" In a sense, it is thus not surprising that the court in *Samuels* concluded that "[i]t is not readily apparent [that successfully] obtaining a marriage license is protected First Amendment activity."[176]

The *Samuels* court nonetheless displayed, in the course of its analysis, an unfortunate and dangerous insensitivity to variations in context. In following *Stanglin*, *Samuels* reminded us that "'[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . .'"[177] Quoting *O'Brien*, the *Samuels* court stated it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech.'"[178] These generalizations were apparently thought to cover the case at hand in *Samuels*.[179]

However useful these generalizations may be, they do not invariably render unnecessary any inquiry into context and circumstance. For our purposes, we need not explore the differences between the message sent by the speaker in an unsuccessful quest for a marriage license and that of a successful quest for a marriage license. Even in the act of unsuccessfully applying, the speaker in *Samuels* was not denied the opportunity to send an intended, and arguably more or less understood, message. Perhaps one could argue that the applicant's message is somehow different where the government, apparently speaking on its own in response, denies the marriage license. However, this would imply that the meaning of the applicant's initial speech itself was incomplete, unclear, or undetermined until the government independently reacted, either favorably or unfavorably, to that speech.[180]

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173. Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136 (N.Y. App. Div. 2006).

174. *See id.* at 146.

175. *See id.*

176. *Id.*

177. *Id.* (quoting City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (social dancing case)).

178. *Samuels*, 811 N.Y.S.2d at 147 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968) (draft card-burning case)).

179. *See Samuels*, 811 N.Y.S.2d at 147 ("Such is the situation here.").

180. For a loose analogy to an even more mysterious process, see, for example, the discussion of

Either way, courts should recognize the notable difference between an act of anti-war draft-card burning,[181] or a deeply symbolic, consciously politically-intended speech by way of applying as a same-sex couple for a marriage license,[182] and a mere random act of social dancing.[183] This is not to say that social dancing can never, in a distinctive context, rise to the level of First Amendment speech, protected or unprotected. Imagine, for example, a conscientious protest against a state that forbids social dancing on religious grounds.[184] Context in these cases can be crucial.

In the same way, application for a marriage license may intentionally send no coherent message, or only the vaguest message possible. But under distinctive circumstances and context, and with the right speaker intentions, applying for a marriage license, successfully or unsuccessfully, may amount to a clear and well-understood political statement.[185] Consider an historic civil rights analogy: Usually, an attempt to have lunch at a downtown drugstore lunch counter says very little. Sometimes, however, just such an act, in its context, is intended, and predictably interpreted, to say a lot—and of great political importance.[186]

We should thus hesitate to conclude that a certain kind of act cannot amount to speech without considering the particular context and circumstances at issue. And we should be equally open to the possibility that some of what is currently accepted as speech for First Amendment purposes may actually not qualify, in light of the basic purposes underlying the Free Speech Clause and a lack of sufficient speaker intent to convey a minimally particularized message.[187]

It is thus apparently easy to assume that commercially-sold videos depicting one form or another of the physically violent abuse of animals

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the collapse of the wave-function in standard Copenhagen-style interpretations of quantum mechanics, *supra* note 165.

181. *See O'Brien*, 391 U.S. at 376.

182. *Samuels*, 811 N.Y.S.2d at 147.

183. *See* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

184. *See, e.g.*, Michael Zuckerman, Book Review, 27 J. INTERDISCIPLINARY HIST. 705, 707 (1997) (reviewing BRUCE C. DANIELS, PURITANS AT PLAY: LEISURE AND RECREATION IN COLONIAL NEW ENGLAND (1995)).

185. Compare the application of a marriage license by a same-sex couple with Gandhi's Salt March to Dandi, Gujarat, in order to symbolically counter the British salt tax. *See, e.g.*, *Gandhi, Salt and Freedom*, THE ECONOMIST, Dec. 23, 1999, http://www.economist.com/world/asia/displaystory.cfm?story_id=347107.

186. *See, e.g.*, David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 660 (1995); Peterson v. City of Greenville, 373 U.S. 244, 245–47 (1963).

187. *See supra* notes 155 & 163 and accompanying text.

amount to speech for First Amendment purposes,[188] with the sole question being the degree of First Amendment protection to be accorded the animal cruelty speech at issue.[189] But before leaping to the debate on whether sales restrictions of videos depicting the violent physical abuse of animals constitutes a content-based restriction of speech that can pass a strict scrutiny test,[190] some attention is due our preliminary question. Perhaps we may wish to set aside any requirement, as in *Johnson*,[191] of an intended, particularized message, which *Hurley*[192] and *Morse*[193] both seem to recommend. Perhaps we may want to classify the animal abuse videos in question as a form of entertainment for a narrow, well-defined audience, and on that basis alone qualify them as speech.[194]

But it would hardly be amiss to wonder whether commercial animal abuse videos invariably embody sufficient speaker intent to convey anything that resembles a particularized message, and whether restrictions on such videos represent official disagreement with any such message. Do states that regulate animal cruelty videos ever show the slightest interest in attempting to suppress oral or written speech that abstractly advocates animal cruelty or its decriminalization? Is the degree of linkage between animal cruelty videos and any of the basic free speech values ever explicitly articulated?[195] Are the animal cruelty videos that count as speech more articulate than the instances of allegedly lewd dancing that do not?[196]

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188. *See* United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (2009).

189. *See id.* (applying a rigorous strict scrutiny approach to the speech regulation in question).

190. *See id.* at 232, 236 (Cowen, J., dissenting) (focusing primarily on the existence of a compelling governmental interest in restricting such speech).

191. *See supra* note 142 and accompanying text; *see also* Brief for Constitutional Law Scholars as Amici Curiae Supporting Appellant, United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc), *cert granted*, 129 S. Ct. 1984 (2009) (No. 08–769), 2009 WL 2331222 at *9 and *9 n.6 (suggesting possible, particularized messages in animal cruelty videos, including the potential violence of pit bulls, the legality of dog fighting, and "the significance of human bloodthirst[] and broader themes concerning animalistic conflict and conquest").

192. *See supra* note 147 and accompanying text.

193. *See supra* note 148 and accompanying text.

194. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("[e]ntertainment, as well as political and ideological speech, is protected . . . .").

195. Probably the best, general argument for classifying animal abuse videos as speech would be that such videos may aim at "the transformation of taste." *See* Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990) (discussing the classification of "casual chit-chat"). But we might want to find such a standard over-inclusive, lest any and every "fashion statement" then becomes a free speech statement. *See infra* notes 209–28 and accompanying text. Nor is it clear, in advance of the evidence, that all distributors, even commercial distributors, of such videos consciously intend, in the act of selling such videos, to communicate such a message. Often, a sale may accommodate a pre-existing (individual) taste, without also proselytizing on behalf of any broader systematic change in cultural tastes.

196. *See* Willis v. Town of Marshall, 426 F.3d 251, 257 (4th Cir. 2005).

Whether all commercial animal abuse videos should qualify as speech for constitutional purposes is actually more doubtful than is often assumed.

XI. MUST WE GIVE IN TO "MODERATE PESSIMISM" IN DISTINGUISHING "SPEECH" FROM "NON-SPEECH"?

It is understandable that some observers have, in light of all the difficulties noted above, adopted a "moderate pessimism" regarding the ability to distinguish speech from non-speech for constitutional purposes. It has thus been argued that "[s]ome expressive conduct is treated as speech, and some as just conduct, but there is no easy way to tell them apart."[197] More particularly, and perhaps more strongly, "it is incredibly difficult to define why some expressive conduct is speech and why other expressive conduct is not; why ignoring the red light is not speech but marching down the middle of the street may be."[198]

In response to such pessimistic concerns, much can be said. We start by noting that most instances of red light-running do not involve an intention on the part of the driver to convey a particularized message under *Johnson*,[199] or even a more diffuse message under *Hurley*[200] or *Morse*,[201] to any audience with which the driver is genuinely concerned. In contrast, at least some diffuse message was presumably intended to be conveyed to the targeted St. Patrick's Day parade onlookers in *Hurley*.[202]

Beyond this, we can point to the helpful roles of both social convention and sheer pragmatism. While remaining sensitive to particular contexts and circumstances, convention and pragmatism suggest the value of presumptions and of a relatively general rule. Thus, we normally classify the impulsive, unauthorized, minimally-publicized, and generally audience-indifferent running of a red light as non-speech. For most red light-runners, having no audience is the ideal. By contrast, most traditional, annual parades running along traditionally-sanctioned parade routes, whether thematically-based on a holiday or not, are reasonably classified as speech. Similarly, non-traditional, occasion-based parades that float down suitable

197. James M. McGoldrick, Jr., *Symbolic Speech: A Message From Mind to Mind*, 61 OKLA. L. REV. 1, 4 (2008).

198. *Id.*

199. *See supra* note 142 and accompanying text.

200. *See supra* note 145–50 and accompanying text.

201. *See supra* note 148 and accompanying text.

202. *See supra* note 147 and accompanying text.

streets, which are intended to attract an audience and convey some evident general message, are also reasonably classified as speech.

These classifications typically make sense at the level of established social convention, and the bounds thereof. But more crucially, the above classifications also make pragmatic sense. The typical red light-runner threatens carnage, typically offers little in the way of an intended message, seeks no comprehending audience, and is not distinctively promoting any of the basic free speech values.[203] Whatever interesting message the typical red light-runner might intend to convey—perhaps "I am in a hurry, or else impatient and irresponsible"—could often be conveyed just as clearly, to an intended audience, through some alternative means or channel of speech.[204] Just driving through a red light may not count as a useful warning of some independent danger. Any possible message like "I am now a serious menace to those around me" largely and pointlessly reproduces the act of dangerous driving itself. The question posed above,[205] that of whether such a borderline "speaker" could, at low cost, have made his status as a speaker substantially clearer, may also be relevant.

A more difficult case of red light-running might involve an ideologically-motivated suicide bomber, or perhaps a conscientious speeder on some important emergency mission, with the latter using his or her car horn to communicate a message of warning. One possible judicial response would be to assume that because cases of genuine speech through red light-running will be so rare, it would not be socially beneficial, all things considered, to recognize such a category. Alternatively, courts could explore the specific context and circumstances surrounding the red light-running cases, and declare any particular instance to either involve speech or not. As we have seen, it is generally important to reach and decide the question of speech or non-speech when the case genuinely presents such an issue.[206] But even the most interesting red light-running cases will not typically involve any such legal issue. Emergency ambulances often run through red lights, and that action may or may not be legally justified, but the ambulance driver's decision is typically independent of whether we believe the ambulance driver to have been a First Amendment speaker or not. All told, there are thus reasonable and constructive responses to the case for moderate pessimism regarding speech.

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203. *See supra* notes 78–81 and accompanying text.

204. For discussion of the importance of alternative speech channels, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

205. *See supra* notes 96–98 and accompanying text.

206. *See supra* notes 56–74 and accompanying text.

XII. IS ABANDONING THE ATTEMPT TO DISTINGUISH "SPEECH" FROM "NON-SPEECH" JUSTIFIED?: A MODESTLY OPTIMISTIC RESPONSE TO STRONG LIBERTARIAN PESSIMISM

We should not succumb to the "moderate pessimism" approach[207] to the problem of distinguishing speech from non-speech. But what can be said in response to an apparently more radical challenge that urges us to simply abandon the attempt to distinguish between speech and non-speech for First Amendment purposes?[208] It has recently been argued that "[c]ases thus far decided . . . suggest that no logical lines can reasonably be drawn to separate speech from nonspeech, content with a message from that without, and expressive acts from nonexpressive ones."[209]

We must first acknowledge that our survey has not exhausted all of the contexts in which the speech versus non-speech distinction arises. Merely for the sake of additional illustration, we should recognize that the boundary between speech and non-speech has also been debated in connection with such matters as school clothing,[210] as well as in regard to clothing in other contexts.[211]

Not surprisingly, clothing-as-possible-speech questions commonly turn out to be highly contextual. One might consider a general proposition that school clothing is normally not First Amendment speech, however expressive of one's self-identity, one's feelings, or of some diffuse self-centered message the clothing may be.[212] It has thus been said that "[s]elf-expression is not to be equated to the expression of ideas or opinions and thus to participation in the intellectual marketplace."[213] On the other hand, some forms of clothing in particular contexts can be intended, and thus are likely to broadly, successfully, convey a reasonably-particularized political message.[214] Even specific colors can be clearly identified, in context, with particular social or political messages.[215] Thus clothing "may . . . symbolize

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207. *See supra* notes 197–202 and accompanying text.

208. *See* Daniel F. Wachtell, *No Harm, No Foul: Reconceptualizing Free Speech Via Tort Law*, 83 N.Y.U. L. REV. 949, 949–50 (2008).

209. *Id.* at 950.

210. *See, e.g.*, Brandt v. Bd. of Educ. of City of Chicago, 480 F.3d 460, 465–66 (7th Cir. 2007); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440–41 (5th Cir. 2001).

211. *See, e.g.*, Zalewska v. County of Sullivan, 316 F.3d 319, 320 (2d Cir. 2003).

212. *See Brandt*, 480 F.3d at 465 (citing Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389 (6th Cir. 2005)).

213. *Id.*

214. *See id.*

215. Beyond the familiar, affiliated gang colors, of course, we might think of the Burmese

ethnic heritage, religious beliefs, and political and social views,"[216] at one level of clarity and particularity or another.[217] Even in close cases regarding clothing-as-possible-speech, courts may attempt to somehow reconcile the tensions between *Johnson*'s requirement of an intended and likely understood particularized message[218] and *Hurley*'s disavowal of any need for "a narrow, succinctly articulable message."[219]

In the clothing cases, courts sometimes reach questionable results by confusing the abstractness or generality of a message with the very different idea of vagueness.[220] A "clothing statement" that is broad, abstract, or general need not also be so vague as to disqualify the expression from the category of speech.[221] Thus, a "broad statement of cultural values"[222] or a "comprehensive view of life and society"[223] need not be disqualified as speech, as long as there is sufficient intention and, where necessary,[224] a probable understanding of the broad message in question. Indeed, some of the most valuable political statements take the form of broad, general statements. If a contextually-political act of flag burning is not invariably too vague to qualify as speech,[225] then a Buddhist monk's act of wearing robes could also, in some contexts, intentionally convey a broad or comprehensive view of life without being too vague to qualify as speech.[226]

"Yellow Revolution" movement, or the Ukrainian "Orange Revolution" movement. *See, e.g.*, Telegraph.co.uk, Harry D. Quetteville, Bangkok Airport Storming Sells Thai People Short, Nov. 26, 2008, http://www.telegraph.co.uk/comment/personal-view/3563779/Bangkok-airport-storming-sells-Thai-people-short.html.

216. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001).

217. *See, e.g.*, Zalewska v. County of Sullivan, 316 F.3d 319, 319–20 (2d Cir. 2003).

218. Texas v. Johnson, 491 U.S. 397, 404 (1989).

219. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995).

220. *See supra* notes 111–36 and accompanying text.

221. For an intriguing case, see *Zalewska*, 316 F.3d at 319–20 (citing E. Hartford Educ. Ass'n. v. Bd. of Educ. of E. Hartford, 562 F.2d 838, 857–58 (2d Cir. 1977)). Certainly a classic work of political theory, like Hobbes's *Leviathan*, can be broad, general, and abstract without being unduly vague.

222. *Id.* at 319 (finding excessive vagueness).

223. *Id.* at 320 (quoting *East Hartford*, 562 F.2d at 857 (finding excessive vagueness)).

224. For example, setting aside the kinds of cases discussed, *supra* notes 166–74 and accompanying text, there are other cases in which, intentionally or even unintentionally, a complex or controversial message is predictably "over the heads" of, and not understood by, most or all the immediate audience.

225. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989); Spence v. Washington, 418 U.S. 405, 409 (1974).

226. Similar sorts of debates over the required kind and degree of "expressiveness" recur in related contexts, including that of various kinds and contexts of jewelry. *See, e.g.*, Grzywna *ex rel.* Doe v. Schenectady Cent. Sch. Dist., 489 F. Supp. 2d 139, 144 (N.D.N.Y. 2006) (middle school student's patriotic red, white, and blue necklace sufficiently particularly communicative and likely understood by audience to qualify as speech). Posture can, in context, be expressive, as in the case of showing respect, reverence, or enthusiasm. *But see, e.g.*, Roulette v. City of Seattle, 97 F.3d 300, 303 (9th Cir. 1996) (plaintiff's sitting on sidewalk held insufficiently communicative). Hair style is

As we move away from the clothing-related cases, however, the problem of determining the bounds of First Amendment speech takes on somewhat different forms. In some cases, for example, those of aggravated criminal harassment via the telephone,[227] there may be grounds for concluding that such harassment does not count as speech in the constitutional sense. It is sometimes said that "[h]arassment is not communication, although it may take the form of speech."[228] Thus, it is fair to imagine that much telephone harassment falls far short of, say, either an attempt at meaningful dialogue or anything like a scathing critique of Simone de Beauvoir's *The Second Sex*.[229]

Some instances of gender-based harassment in the workplace under Title VII may be similarly analyzed.[230] It is imaginable that some instances of workplace harassment could amount to explicitly ideological speech, meeting even the most rigorous interpretations of the *Johnson* two-part test for speech.[231] The untidy fact that some workplace harassment amounts to

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generally not seen as expressive. *See, e.g.*, Karr v. Schmidt, 460 F.2d 609, 613–14 (5th Cir. 1972) ("[W]e think it doubtful that the wearing of long hair has sufficient communicative content to entitle it to the protection of the First Amendment") (without referring to cultural context of Vietnam War-era protest symbolism, but noting plaintiff's professed lack of political message). Tattooing poses an interesting question of expression for First Amendment purposes. *See, e.g.*, Hold Fast Tattoo, LLC v. City of N. Chi., 580 F. Supp. 2d 656, 659–60 (N.D. Ill. 2008) ("[t]he act of tattooing . . . is not intended to convey a particularized message" and is therefore not speech for First Amendment purposes). The court in *Hold Fast Tattoo* appeared to concede that the bearer of a visible tattoo may well intend to convey an adequate such message. *See id.* at 660. Consider the tattoo equivalent of the protected anti-draft message lettered on a jacket in *Cohen v. California*, 403 U.S. 15 (1971). But the *Hold Fast Tattoo* court appeared to assume, along with a number of other courts, that the tattoo artist, regardless of the scope of available discretion as to the particular message conveyed, will not count as a speaker for First Amendment purposes. See *Hold Fast Tattoo*, 580 F. Supp. 2d at 660 n.1. Surely the status of being an artist with a more or less specific commission cannot always preclude the commissioned artist from also being a speaker, perhaps along with the commissioning party. For an extreme case relating to the issue of commissioned-artist-as-speaker, *see generally* IRVING STONE, THE AGONY AND THE ECSTASY: A BIOGRAPHICAL NOVEL OF MICHELANGELO (1961) (Michelangelo, Pope Julius II, and the painting of the Sistine Chapel ceiling).

227. State v. Brown, 85 P.3d 109 (Ariz. Ct. App. 2004).

228. *Id.* at 112 (quoting Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988)); *see also supra* note 62 (example of the "Blaring Car Horn").

229. *See generally* SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., Vintage Books 1989) (1949).

230. See the general, analytical scheme set forth in *Baty v. Willamette Industries*, 172 F.3d 1232, 1246 (10th Cir. 1999) (citing Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534–36 (M.D. Fla. 1991) (raising the possibility of discriminatory conduct as distinct from speech)). *See also* Doe v. City of New York, 583 F. Supp. 2d 444, 448–49 & 448 n.3 (S.D.N.Y. 2008).

231. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

speech and some does not underlies the extensive debates over the proper role of free speech analysis in Title VII sexual harassment cases.[232]

These and other[233] complications should not, however, lead us to the apparently radical course of seeking to abandon the general distinction between speech and non-speech for free speech purposes.[234] It may be tempting to conclude that there is nothing distinctive about speech in its core uses, and that the basic reasons for protecting freedom of speech[235] should lead us to a constitutionally mandated libertarianism of speech and conduct,[236] with no need to differentiate between the two. The idea would be that speech-as-conduct should generally be constitutionally protected.[237] The exceptions to such general libertarian protection would focus primarily on preventing or punishing "intrusions upon bodily integrity or economic

232. For a mere sampling of some of the broader literature regarding workplace harassment and the First Amendment, see Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1; Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995). Of course, even to the extent that workplace harassment may sometimes involve speech, civil rights considerations may validate the application of Title VII remedies in such cases. See the discussions in the cases cited *supra* note 230.

233. For a sampling of additional problematic categories, see the case discussions of begging and panhandling in *Young v. New York City Transit Authority*, 903 F.2d 146, 154 (2d Cir. 1990) ("Whether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct."), and the more accommodating *Loper v. New York City Police Department*, 999 F.2d 699, 704 (2d Cir. 1993) ("We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed."). For examples of work solicitation by day laborers, see *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1031 (D. Ariz. 2008) ("'It is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech' . . . .") (quoting ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 792 (9th Cir. 2006)). Examples of illegal commercial solicitation include *United States v. Williams*, 128 S. Ct. 1830, 1841–42 (2008) ("offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection") (but presumably an offer to sell a stolen political bumper sticker could count as political speech, however, subject to regulation). For an example of printed store receipts with the expiration date of the purchaser's own credit card, see *Cicilline v. Jewel Food Stores, Inc.*, 542 F. Supp. 2d 842, 845 (N.D. Ill. 2008) ("Given the information conveyed by the receipts, each receipt constitutes a deliberate—albeit dry—communication . . . and therefore constitutes 'speech' within the contours of the First Amendment.") (despite the fact that the "audience" already knows, and hardly needs confirmation or reinforcement of, the expiration date of their own credit card). *See also* Davis v. FEC, 128 S. Ct. 2759, 2782 (2008) (Stevens, J., concurring in part and dissenting in part) (citing J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976)); McConnell v. FEC, 540 U.S. 93, 250–51 (2003) (Scalia, J., concurring in part and dissenting in part) (discussing the relationship between the expenditure of money to finance speech and speech itself), *overruled by* Citizens United v. FEC 130 S. Ct. 876 (2010).

234. *See* Wachtell, *supra* note 208 at 950.

235. *See supra* notes 78–81 and accompanying text.

236. *See* Wachtell, *supra* note 208, at 950–51.

237. *See id.* at 950.

interests,"[238] as opposed to a number of subjective, abstract, psychic, or intangible harms.[239] An after-work nip of brandy, or avoiding a seat belt or motorcycle helmet, would then become matters of the First Amendment.

There are some areas of free speech law where such a proposal may seem less like a radical reform and more like a mere reflection of established law. Part of the underlying but unexpressed motivation for declaring commercial nude dancing to be speech[240] may be a dislike of government repressiveness regarding sex or nudity in general. Thus, in some limited respects, a proposal to abandon the speech versus non-speech distinction may not depart much from the status quo.

In fact, there may be a number of cases the analysis and resolution of which might not differ much whether we adopted a standard "basic free speech value" analysis or an analysis in terms of a new constitutionally-protected, broad conduct libertarianism. Consider, for example, a case of cross burning[241] or some other form of hate speech[242] on both approaches. Could not both approaches take into account the same considerations at the same weight, including property rights, expressiveness, reasonable fears, intimidation and coercion, and the intentional infliction of emotional distress? If not, is it clear that a libertarian emphasis on mostly tangible harms and economic interests at the expense of some "psychic" injuries or "offenses" will typically be superior in the hate speech context?

There is a deeper problem with regard to any proposed abandonment of the speech versus non speech distinction in favor of any sort of broader libertarianism. Defining the boundaries of what should rightly be protected under libertarianism has already proven to be no more easily managed than the problems of defining the boundaries of speech. We cannot explore here the deep and endless controversies over how to formulate, clarify, defend, or modify John Stuart Mill's "Harm Principle."[243] But by abandoning the

238. *Id.*

239. *See id.*

240. *See supra* note 155 and accompanying text.

241. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003) (upholding the general principle of prohibiting cross burning done with the intent to intimidate).

242. *See, e.g.*, Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846 (Cal. 1999) (upholding an injunction against the use of racial epithets in the workplace even when the targeted employees were not in a position to hear them).

243. See MILL, *supra* note 68, at 29, 68, and Professor Himmelfarb's Introduction thereto. *See also* Joel Feinberg, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1984); JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003); J.S. MILL ON LIBERTY: IN FOCUS (John Gray & G.W. Smith eds., 1991); LIMITS OF LIBERTY: STUDIES OF MILL'S ON LIBERTY (Peter Radcliff ed., 1966); JOHN GRAY, MILL ON LIBERTY: A DEFENCE (2d ed. 1996);

search for the proper bounds of speech in favor of anything like the best libertarian harm principle, we do not trade murkiness for clarity, relevance, and ready consensus.[244] All things considered, the more radical case for attempting to abandon the speech versus non-speech distinction thus seems unpromising.

XIII. CONCLUSION

As anticipated,[245] we have arrived at an untidy solution: properly setting the bounds of what should count as speech for First Amendment purposes is a judicially[246] and theoretically[247] inescapable task of unavoidable complexity. A number of interrelated factors, operating at varying levels of specificity, must all be given their due. To this end, we have identified and discussed above the proper role of a number of layered but interactive approaches in sorting out speech from non-speech.

Thus, we drew upon the relevant constitutional text and any available original constitutional meaning[248] of speech in the First Amendment sense. We considered the substantial value, as well as some limitations, of Professor Schauer's functionalist approach[249] to the scope of speech. We then took into account the categories of symbolism and pre-symbolism in specifically-constitutional speech.[250] The temptation to judicially bypass the complex task of defining speech was considered but firmly rejected on substantive grounds.[251]

Substantial guidance was instead drawn from referring to the fundamental values normally thought to underlie our constitutional protection of speech in the first place.[252] But we recognized that courts rightly do not adjudicate cases by direct and immediate reference to the

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DAVID LYONS, RIGHTS, WELFARE, AND MILL'S MORAL THEORY 89–108 (1994); JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115–33 (1993).

244. There is, for example, no entirely neutral, short-cut, consensus solution under a harm principle approach to the problem of a religious believer who claims that being forced to tolerate public blasphemies will result not merely in his or her being offended, but in generally undesirable long-term indirect social harms, or in divinely ordained plagues and disasters, or even in his or her own eternal post-mortem torment for tolerating blasphemies by others.

245. *See supra* note 9 and accompanying text.

246. One cannot judicially bypass the problem by merely assuming for the sake of argument that nearly everything counts as speech and then fairly adjudicating the case from there. *See supra* notes 56–74 and accompanying text.

247. *See supra* notes 197–11 and accompanying text (discussing the proper response to "moderate pessimism" toward our inquiry). *See also supra* notes 208–50 (discussing various responses to a more literally radical pessimism or an apparently dramatic reformulation of the issue).

248. *See supra* Part II.

249. *See supra* Part III.

250. *See supra* Part IV.

251. *See supra* Part V.

252. *See supra* Part VI.

fundamental free speech values. Courts should instead invoke different levels and degrees of specificity in their analysis, in interactive and mutually complementary ways. Thus, we explored the usefulness of not just the fundamental free speech values, but also of general rules that might shed light on the scope of speech, of mid-level heuristic devices, and of attending to specific context and circumstance.[253] Each of these levels of analysis deserves to be accounted for in a process of "reflective equilibrium."[254] With these interactive approaches constituting the core of our legal analysis, we then sought to draw upon any relevant supplementary insights from the general literary theory of meaning[255] and in particular from the literary theory of ambiguity and vagueness.[256]

With our basic theoretical apparatus in place, we considered the elements of synthesis, tension, and uncertainty in the leading Supreme Court opinions on the scope of speech.[257] We subjected the Court's results to critique, through our theoretical apparatus, in the context of the further judicial application of the Court's own precedents.[258] Our results cast doubt on the clarity, persuasiveness, and straightforward applicability of crucial Supreme Court precedents.

We then rounded out the analysis by responding to both a moderately pessimistic and an at least apparently more dramatically pessimistic[259] approach to the complex task of distinguishing speech from non-speech for constitutional purposes. Neither form of pessimism, it turned out, was pragmatically justified in the sense of avoiding difficult problems of constitutional interpretation or otherwise leaving us better off than before.[260]

Overall, our approach thus remains multi-faceted and unavoidably complex. The complexity is the price necessarily paid for the desired sensitivity to important differences in the forms and contexts of communication.

For the sake of a convenient summary, we can say that the heart of our approach involves a shifting, intuitive interaction among the basic purposes of protecting speech in the first place, useful general rules, what we have called mid-level heuristics, relevant theory, and more particularized attention

253. *See supra* Part VI.
254. *See supra* note 86 and accompanying text.
255. *See supra* Part VII.
256. *See supra* Part VIII.
257. *See supra* Part IX.
258. *See supra* Part X.
259. *See supra* Part XI.
260. *See supra* Part XII.

to specific context and circumstance, with none of these components being absolutely privileged. While our approach remains complex, the vertical layering of the interactive elements, with their different degrees of specificity, allows for a visualization of the major considerations.